[redacted]

October Term, 1938.

No. 515.

[redacted]

The Washington, Portland Gas Company, [redacted],

Petitioner,

v.

Dora Pickens, Hazen S. Allen and Van Buren Pickens, [redacted],

Respondents.

PETITION OF THE RESPONDENTS FOR A REHEARING.

Ernest Haycox,
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February 21, 1939.

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In The

Supreme Court of the United States

October Term, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN and VAN REES PRESS, INC.,
Respondents.

PETITION FOR REHEARING

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents, Drew Pearson, Robert S. Allen and Van Rees Press, Inc., pursuant to Rule 33, respectfully petition for a rehearing of the above entitled cause, a decision adverse to them having been rendered on January 30, 1939, Justices Black, Roberts and Reed dissenting, and in support of their petition respondents state:

I.

THE FUNDAMENTAL REASON FOR THIS PETITION.

The majority opinion holds that deposit of copies and registration of the copyright of a work published with the required notice are not necessary to *create* the right to maintain a suit for infringement, but that such a right actually exists *immediately* upon publication with notice, the statutory requirements of deposit and registration being mere formalities with which the copyright proprietor may comply *at any time* before a suit for infringement is instituted.

The majority opinion thus changes the general conception of the copyright law as it affects published works. Although the strict requirements of the statute actually remain the same, it is no longer necessary, as a *practical* matter, to deposit copies and obtain registration of copyright thereof *except* where there has been an infringement and suit is to be instituted in connection therewith, or where demand for copies has been made by the Register of Copyrights. This presents an anomalous situation which was clearly not contemplated by the majority opinion, but which is so real and is fraught with such unfortunate consequences that the respondents consider it their duty to afford an opportunity for a rehearing.

II.

SUMMARY OF REASONS FOR REHEARING.

1. The majority opinion amends the Copyright Act of 1909 by eliminating the incentive for prompt deposit and registration provided by Section 12, and by changing Section 13 to make it impose upon the Register of Copyrights a *duty* to police the entire publication field in order to make it possible for him to comply with other sections of the Act.

2. The majority opinion virtually imposes a penalty for strict compliance with the requirements of the Act concerning deposit of copies and registration of copyright of *published* works. This it does by giving the ultra conscientious copyright proprietor—the proprietor who promptly deposits his copies and pays the registration fee even though no suit for infringement be contemplated and no demand by the Register of Copyrights has been made or is even anticipated—no advantage which is not enjoyed by the copyright proprietor who elects to save the trouble and expense of deposit and registration until infringement proceedings are about to be instituted or until the Register makes demand. Conversely, it visits no disadvantage whatsoever upon the copyright proprietor who ignores the deposit and registration provisions until infringement proceedings are about to be instituted or until the Register makes demand.

3. The majority opinion invites disregard for the copyright law on the part of copyright proprietors of *published* works by assuring them that they need not go to the trouble and expense of depositing copies and registering their copyrights unless and until an infringement proceeding is about to be instituted or the Register makes demand.

4. The majority opinion favors copyright proprietors of *published* works because they are allowed to ignore, with impunity, the deposit and registration provisions, and the trouble and expense incident to compliance therewith, unless an infringement proceeding is about to be instituted or the Register makes demand, whereas proprietors of *un*published works under Section 11 must make deposit and secure registration of copyright before the copyright itself can be obtained.

5. The majority opinion renders of little value the official registry and the catalogues and indexes required by the Act because copyright proprietors of *published* works, whose registrations have, in the past, constituted more than 70% of the total, may be expected to take advantage of the mone-

tary saving afforded by the changed concept of the deposit and registration provisions. As a result the catalogues and indexes thereto published by the Copyright Office will be limited largely to *un*published works and will thus fall far short of presenting a complete registry of copyright works and fulfilling its purpose of supplying such data to collectors of customs and postmasters in accordance with the lists prepared by the Secretary of the Treasury and the Postmaster General under Section 57.

6. The majority opinion shifts to taxpayers in general the burden now carried, as contemplated by the Act, by copyright proprietors. Inasmuch as approximately 80% of the revenue of the Copyright Office is realized from registrations of *published* works, it is obvious that a material decrease in such registrations will result in the operation of the Copyright Office at a substantial loss, rather than at a profit as in the past, and will necessitate an appropriation from the general funds of the United States if the Copyright Office is to continue in existence.

7. The majority opinion fails to take into consideration and give effect to all provisions of the Act. It does not even list, among "Pertinent portions of the statute", Sections *56* (requiring indexing of copyright registrations and printing of catalogues of copyright entries), *57* (providing for *prompt* distribution of the catalogues of copyright entries to collectors of customs and postmasters to prevent importations prohibited by Sections *30* and *31*), and *58* (requiring record books and indexes to be open to public inspection).

8. The *respondents' contention* takes into consideration and gives effect to all provisions of the Act. It gives to the copyright proprietor the *exclusive* right to print, publish, and do the other things enumerated in Section 1 upon his compliance with the deposit and registration provisions. Until such time he has no right to sue for an infringement. So he must deposit and register promptly—without delay—if he wishes to avoid a period during which an infringement may occur for which he cannot sue.

III.

REASONS FOR REHEARING.

1. The Majority Opinion Amends the Copyright Act.

The majority opinion amends the Copyright Act of 1909 by eliminating the incentive for prompt deposit and registration provided by Section 12. This it does by holding that the right to maintain a suit for infringement is created at the same time as the copyright itself—upon publication with the required notice—and that the statutory requirements of prompt deposit and registration are mere formalities with which the copyright proprietor may comply at any time before suit for infringement is instituted. True, the opinion purports to give effect to the word "promptly" as repeated in Section 13, but it is obvious that, as there used, the word is practically meaningless because the sole purpose of that Section is to impose a penalty for failure to deposit copies *after a demand therefor has been made* by the Register of Copyrights. This demand *may* be made "*at any time* after the publication of the work". Even after demand a copyright proprietor living in the United States has *three months* within which to comply.

Inasmuch as the Register of Copyrights has no practical means of knowing who has published with notice of copyright but without depositing copies and obtaining registration, the requirement of promptness may be said to be of no significance in Section 13. Obviously, that is the reason the Register is, by the plain language of the Section, merely given the authority, and is not compelled, to make demand upon the proprietor to deposit copies and obtain registration.

Therefore, the majority opinion makes the Copyright Act of 1909 similar to that in effect in many European countries, although the Congress of the United States has consistently refused to change our law to conform to that of Europe. There a copyright and all of the privileges

pertinent thereto are secured automatically and without any *notice* of copyright. Nor is any deposit necessary or required for any purpose. Under our Act, as *now* interpreted by this Court, deposit and registration are *theoretically required* in all cases, but are only *actually necessary* when suit is contemplated or demand is made for copies.

The majority opinion also amends the Copyright Act by making it mandatory, instead of permissive, for the Register of Copyrights to demand copies of all works published with notice of copyright. This becomes necessary in order to insure the revenue contemplated by the Act for the registration of published works and also to insure the publication of complete catalogues and indexes of copyrighted works as contemplated by Section 56. Prior to the rendition of the majority opinion, the Register of Copyrights could rely upon the requirement of promptness to secure copies and the information incident to registration. However, if the interpretation enunciated by the majority opinion be allowed to stand it will mean that the Register must look to Section 13 not as a convenience in the case of an emergency but as imposing upon him a duty to *police* the entire publication field in an effort to keep himself advised of works published with notice of copyright so that he may examine his records and determine whether or not proper deposit and payment of the registration fee have been made. Even then, the difficulties attending such a duty, and the large field staff which would obviously be necessary, would appear to be such that it would be impossible for the Register to realize the revenue essential to maintaining his office, as in the past, or to publish adequate catalogues. Surely such a result is not contemplated by the Act.

2. The Majority Opinion Virtually Penalizes Those Who Comply with the Law.

Although the exclusive right of a copyright proprietor to print, publish, vend, and do the other things enumer-

ated in Section 1, arises only "upon complying with the provisions of this Act", the majority opinion gives that right, at least potentially, to all persons who have secured a copyright by publication with notice thereof irrespective of deposit and registration. The Act clearly contemplates, and many court decisions have so indicated, that one of its principal purposes is to provide an official registry of copyrights, together with a showing as to when the monopolies were acquired so that all may know when they will end, and Section 56 requires the Register of Copyrights to print at periodic intervals catalogues of copyright entries, together with indexes thereto, which, in the aggregate, are obviously expected to be representative of all existing copyrights. However, the majority opinion makes unnecessary the deposit of copies of published works and payment of the registration fee except when a suit is to be instituted for infringement, or when a demand is made by the Register under Section 13. Thus a copyright proprietor, who complies with the clear requirements of the statute regarding deposit and registration, irrespective of the changes wrought by the majority opinion, actually pays a penalty for such compliance unless a demand has been made for deposit or unless a suit for infringement is to be instituted. The cost of the copies deposited, and the amount of the registration fee, would otherwise be an entirely unnecessary expense.

3. The Majority Opinion Invites Disregard of the Law.

Inasmuch as the majority opinion makes necessary the deposit of copies and registration of published works only when the proprietors of the copyrights thereof are about to sue for infringement or have received a demand from the Register of Copyrights, it would be poor economics for a copyright proprietor of a published work to make deposit and pay the registration fee under any other circumstances. The chances that it will become advisable for him to sue for infringement are comparatively neg-

ligible, as is also the possibility that the Register of Copyrights may learn of his publication with notice and of his failure to deposit. Furthermore, he can lose nothing by waiting to deposit and register after infringement has taken place or after the Register has made demand. True, in the latter case his copyright will become void and he will be liable to a fine *if* he does not make deposit *within three months*, but compliance within that time may hardly be considered a hardship.

Under these circumstances it would be small wonder if publishers who pay hundreds of dollars to the Copyright Office each year for registration of the copyrights of published works should hail the majority opinion as affording a means for large savings at the expense of the general public and without fear of untoward results. Furthermore, as stated in the dissenting opinion of Mr. Justice Black, "it is unreasonable to assume that an owner of a copyright will voluntarily make the extent and limitations of his monopoly more public than the law requires."

4. The Majority Opinion Favors Copyright Proprietors of Published Works.

The requirement of prompt deposit contained in Section 12 and made the subject of reference in Section 13 applies only to *published* works. Section 11 of the Copyright Act provides for the copyright of *un*published works "by the deposit, with claim of copyright, of one complete copy of such work", etc. No notice of copyright is required. The copyright and the right to sue for infringement thereof are created at one and the same time by making deposit and securing registration as required. Therefore, a proprietor of a copyright obtained under Section 11 must have made the required deposit and paid the registration fee before he even became a copyright proprietor.

The copyright proprietor of a *published* work, on the other hand, becomes a copyright proprietor immediately

upon the publication of his work with notice of copyright as required by Section 9 of the Act. The majority opinion states, in effect, that he may enjoy the monopoly thus acquired *without further compliance* with the Act unless he should find it advisable to bring suit for infringement or unless he should receive a demand from the Register of Copyrights. It should be remembered that the demand itself is no reflection upon the copyright proprietor and is practically no burden upon him because it gives him *three months* to deposit copies—to do that which he was originally to have done *promptly*.

Thus, under the interpretation placed upon the Act by the majority opinion, the proprietor of the copyright of a published work must have complied with no requirement of the Act save that regarding publication with notice of copyright, except in the case of suit for infringement or a demand by the Register, whereas the proprietor of the copyright of an *un*published work must have complied with *all* requirements of the statute in the first instance.

5. The Majority Opinion Renders of Little Value the Official Registry and the Catalogues Required by the Act.

Section 54 of the Copyright Act requires the Register of Copyrights, whenever a copy of a work has been deposited, to *"make entry thereof"* in "such record books in the Copyright Office as are required to carry out the provisions of this Act". This is only possible where deposit is made and accompanied, as required both in the case of published and of unpublished works, by a claim of copyright in the form of an application for registration containing various data which Section 55 provides shall appear on the certificate of registration to which every copyright claimant is entitled.

Section 56 provides that the Register of Copyrights "shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalogue of

the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalogues for each class of copyright entries".

Section 57 provides for the distribution and public sale of the catalogue. The Copyright Office is required "promptly" to distribute the current catalogues as they are issued "to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised lists of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster-General, . . ." The purpose of this provision is to acquaint the postmasters and the customs officers with the titles of, and other information concerning, *all* works copyrighted in the United States in order to enable them to prevent the unlawful importation of copies of such works printed in foreign countries.[1]

Section 58 provides that "the record books of the Copyright Office, together with the indexes to such record books,

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[1] Section 30 prohibits the importation of any article bearing a false notice of copyright, or of any piratical copies (actual copies or substantial reproductions) of any work legally copyrighted in the United States. (See Article 543(a) of the 1937 Customs Regulations, Treasury Department, Bureau of Customs.)

Section 31 prohibits the importation of piratical copies of any book during the existence of its American copyright, and, with certain exceptions, of any copies thereof, although authorized by the author or proprietor, which have not been produced in accordance with the manufacturing provisions specified in Section 15.

Section 32 provides for seizure and condemnation of articles imported (except in the mails) in violation of Sections 30 and 31.

Section 33 empowers and requires the Secretary of the Treasury and the Postmaster-General "to make and enforce such joint rules and regulations as shall prevent the importation into the United States in the mails of articles prohibited importation by this Act".

and all works deposited and retained in the Copyright Office, shall be open to public inspection".

The entries in the record books of the Copyright Office, and the catalogues of such entries, together with the indexes thereto, are obviously intended to represent a *complete list* of copyrighted works. Otherwise, they would be of little value to customs officers, postmasters, libraries, and interested private individuals. However, this purpose would not be accomplished under the majority opinion making necessary deposit and registration of published works *only if* suit be contemplated or if demand be made. The result would be that, with minor exceptions, only *un*published works would be deposited and registered. Inasmuch as *published works constitute more than 70%* [2] *of all registrations,* it is readily seen that the omission of a large number of published works from the catalogues would defeat one of the plain purposes of the Act.

6. The Majority Opinion Shifts to Taxpayers in General the Burden Now Carried, As Contemplated by the Act, by Copyright Proprietors.

The Congress contemplated that the persons who are the beneficiaries of the privileges granted by the Copyright Act

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[2] The Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1937, page 2, shows that there were 154,424 registrations. Of these, 112,510 were registrations of published works at $2 each; 31,874 were registrations of unpublished works at $1 each; 1,451 were registrations of photographs, without certificates, at $1 each; and 8,589 were registrations of renewals of all types at $1 each.

The Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1938, page 2, shows that there were 166,248 registrations. Of these, 118,153 were registrations of published works at $2 each; 35,947 were registrations of unpublished works at $1 each; 2,208 were registrations of photographs, without certificates, at $1 each; and 9,940 were registrations of renewals of all types at $1 each.

should bear all, or at least a substantial part, of the cost of its administration. Otherwise, the registration fees required by Section 61 would have been omitted, and the Congress would not have taken the trouble to increase the registration fee of unpublished works from $1 to $2 as it did by the Act of May 23, 1928.[3] As a matter of fact, the annual reports of the Register of Copyrights show that the Copyright Office has, since its organization in 1897, earned more in fees than it has expended. For the fiscal year ending

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[3] The Act of May 23, 1928, 45 Stat. 714, increasing copyright fees is set forth in full on pages 28 and 29 of the Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1928. The Committee on Patents, to which the bill (H. R. 6104) was referred, submitted its report (House Report No. 353) unanimously approving the same. This report, which appears in full on Pages 29 to 31 of the said Annual Report of the Register of Copyrights clearly shows that the registration fees should be commensurate with the cost of the service performed by the Copyright Office and that the beneficiaries of the privileges granted by the Copyright Act should pay the expense of its administration. The House Report contains the following significant statements:

> "This bill proposes an increase of the registration fee from $1 to $2 for each registration made, which is to include a certificate of such registration, and a corresponding increase in the subsidiary fees for the recordation of documents, and their comparison, and for searches and for renewals, etc. . . .
>
> " . . . The fees now paid do not cover the actual cost of the service performed, including salaries, supplies, printing of blanks, certificates, and circulars, and of the Catalogue of Copyright Entries, nor the overhead charges of the Copyright Office for space, light, and heat, etc.
>
> "Under all the circumstances the increase in fees proposed by the bill seems reasonable. . . . "

June 30, 1937,[4] 112,510 published works were registered at $2 each, thus bringing to $225,020 the total revenue realized from this source. This amounted to more than 80% of the gross revenue of the Copyright Office. During the fiscal year ending June 30, 1938,[5] 118,153 published works were registered at $2 each, thus making a total revenue of $236,306 from this source alone. If the present decision of the Court had been in effect during the two fiscal years mentioned, it may be conservatively stated that more than 100,000 of those published works which were deposited and registered would never have appeared in the Copyright Office.[6]

Inasmuch as there are relatively few suits for infringement of published works as compared with the more than

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[4] See the Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1937, page 2.

[5] See the Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1938, page 2.

[6] It may be of more than passing interest to note the reaction of the well-known publishing business trade magazine, EDITOR & PUBLISHER, toward the interpretation placed upon the Copyright Act by the majority opinion. If the comments of that publication be considered indicative of the attitude of the publishing business, as they may well be, there is no question but that registrations of published works will sharply decline almost immediately. The comments appeared in the February 4, 1939, issue in the form of an editorial entitled "Copyright Anomaly" which states:

> "Trouble looms for publishers in the decision this week by the U. S. Supreme Court on copyright protection. As we read the court's ruling, it seems to mean that *matter on which a publisher claims copyright need not be deposited in the Library of Congress with the reasonable promptness that all have assumed until now was required, nor need a copyright fee be paid at the time of publication.* He publishes his claim with a copyright line at the time of publication, and it appears that the court will sustain his claim against another, who assumed that the absence of copy from the Library of

112,000 registrations per year, it is evident that the fees provided by Section 61 in connection with published works would amount to merely a nominal sum if paid only by those who contemplate infringement proceedings, or who make deposit and secure registration only after demand under Section 13. This is obviously true because, as heretofore stated, there is no way for the Register of Copyrights to learn of a failure to deposit copies except by examining every published work carrying a copyright notice, or through information voluntarily furnished by interested parties. Thus there would be shifted to taxpayers in general the burden now carried, as contemplated by the Act, by copyright proprietors.

7. The Majority Opinion Fails to Take Into Consideration and Give Effect to All Provisions of the Act.

The Court has frequently called attention to the fact that every section and provision of a statute should be interpreted by reference to every other and that one part should not be construed so as to annul or destroy that which has been granted by another, but the construction should be such as to permit all sections to stand together. Deposit of copies and registration of copyright are clearly required by Section 12, and are not merely made obligatory as conditions to the right to sue for infringement or in response

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Congress indicated that the matter was free to all comers.

"We often fail to understand the logic of judicial decision, and we see in this one a chain of legalistic reasoning which defeats the evident intention of the legislature. It destroys the law, because Congress neglected to include a glossary of the statute's key words, and it is the sort of decision which makes work for the shyster lawyer, trouble for the honest publisher, and profits for the crook." (Emphasis supplied.)

to a demand by the Register of Copyrights under Section 13. Further evidence of this fact is found in the provision of Section 56 requiring indexing of copyright registrations and printing of catalogues of copyright entries, in the provision of Section 57 requiring prompt distribution of the catalogues of copyright entries to collectors of customs and to postmasters to prevent importations prohibited by Sections 30 and 31, and in the provisions of Sections 54 and 58 requiring the maintenance of an official registry and that the record books and indexes be kept open for public inspection. As previously stated, the official registry and the catalogues and indexes compiled therefrom are obviously intended to contain information concerning all copyrighted works, not only unpublished works copyrighted under Sec. 11 and published works copyrighted under Section 9 whose proprietors have instituted infringement proceedings or have received a demand from the Register, but also published works copyrighted under Section 9 and never made the subject of infringement proceedings or the object of a demand from the Register. However, if the construction imposed by the majority opinion be permitted to stand, these provisions, which represent a clear intention of the Congress, will be nullified, at least in large part, and the procedure which has been followed by the Copyright Office and accepted by the general public for a period of thirty years will be substantially changed—changed by judicial legislation.

8. The Respondents' Contention Takes into Consideration and Gives Effect to All Provisions of the Act

The majority opinion states:

> ". . . The Act nowhere defines 'promptly' and to make the continued existence of copyright depend upon promptness would lead to unfortunate uncertainty and confusion. . . .

> ". . . Evidently mere delay does not necessarily invalidate the copyright; its existence for three months after actual notice is recognized. Without right of vindication a copyright is valueless. It would be going too far to infer that tardiness alone destroys something valuable both to proprietor and the public."

These statements would indicate that the only contention urged by the respondents was that the failure of the petitioner promptly to deposit copies and secure registration was fatal to its right to bring suit for infringement at any time, no matter when the infringement took place. It would also indicate that the respondents contend that the copyright itself was invalided by tardy deposit.

The respondents have never contended that the petitioner did not secure a valid copyright by publication under Section 9 with the required notice. On the contrary, they have always admitted its validity. But they have contended that the copyright thus secured was a bare right and was not accompanied by the right to sue for an infringement thereof; that the right of suit did not come into existence until copies were deposited and registration obtained. Although it was suggested that the failure promptly to deposit might forever bar a right of action, this contention was not urged by the respondents in the argument before this Court; instead, they urged that a failure promptly to deposit merely afforded a period during which the petitioner was without any right of action and, therefore, could not sue for any infringement occurring during that time.

Under Section 1 of the Act the *exclusive* right to print, publish, vend, and do the other things enumerated, accrues "upon complying with the provisions of this Act". The majority opinion makes no attempt to deny the applicability of Section 1, or that the deposit and registration requirements are "provisions of this Act", but it does give to a copyright proprietor the exclusive right made available by Section 1 even *before there has been compliance with the deposit and registration provisions.*

The majority opinion stresses the failure of the Act to define the word "promptly". However, it is not necessary to have any such definition. The word "promptly", when considered in the light of the entire Act, is nothing more or less than a warning that a copyright proprietor can only secure the maximum protection under the Act by depositing and registering without delay, because he has no exclusive right to print, publish, etc., until *after* he has complied with all applicable provisions.

If Section 12 be so construed, there will be no destruction of the copyright or of the right to sue for infringement, but *the proprietor will secure the right to sue immediately upon complying with the deposit and registration provisions.* Section 13 is not affected in any way, because the Register may still make demand at any time after publication. Because of the fact that the great majority of persons securing a copyright under Section 9 will want to be in a position to sue for an infringement no matter when it will take place, they will be inclined to make deposit and secure registration without delay so that there will be no period when an infringement may take place for which suit will not lie. Thus the Copyright Office will be enabled to keep a complete registry of copyrighted material as it has in the past and as contemplated by the Act, and the catalogues and indexes thereto required by Section 56 will be representative of all copyrighted works, both published and unpublished, and be of maximum value to the collectors of customs, the postmasters, and to the general public. There will be no decrease in the revenue received by the Copyright Office from the registration of published works. All copyright proprietors will be on an equal basis, whether their works are published or unpublished. In short, effect will be given to every section and to every purpose of the Act, and the only loser will be the person who ignores the deposit and registration requirements until after infringement has occurred. This is as it should be and is the construction which the respondents urge upon the Court.

IV.

CONCLUSION.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States Court of Appeals for the District of Columbia be, upon further consideration, affirmed.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Respondents.
729 Fifteenth Street,
Washington, D. C.

February 21, 1939.

CERTIFICATE OF COUNSEL

We, Elisha Hanson and Eliot C. Lovett, counsel for the above named respondents, hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith for the reasons stated and not for the purpose of delay.

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Respondents.